In The

Supreme Court of the United States

October Term, 1978

No. 78-1535

ODELL BROWARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Odell Broward, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on March 9, 1979 reversing the Order of the Trial Court of October 25, 1978 which dismissed the indictment against petitioner.

OPINION BELOW

The opinion of the Trial Court reported at 459 F. Supp. 321, is printed as Appendix A. The opinion of the Court of Appeals, not yet officially reported, is printed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where the Trial Court found that government officials lied under oath as to material facts at the suppression hearing and in a search warrant application, which finding remains undisturbed, was it an abuse of discretion, as held by the Court below, for the Trial Court to dismiss the indictment?

RULES OF EVIDENCE INVOLVED

The provisions of the Federal Rules of Evidence cited are printed as Appendix C.

PRELIMINARY STATEMENT

On March 9, 1976 petitioner and his co-defendant entered pleas of not guilty to the indictment, filed on March 4, 1976, in the Western District of New York, at Buffalo, charging petitioner with conspiracy to distribute heroin and aiding the distribution of heroin. 21 U.S.C. §§841(a)(1), 846.

Suppression hearings were held on August 11, 15, 16, 17, 19, 24, and November 3, 1977 relating to evidence obtained from electronic eavesdropping conducted in Toronto, Ontario and from the search of co-defendant Forbes' apartment following the execution of arrest and search warrants on Forbes.

With respect to the motion for suppression of evidence obtained upon the execution of the arrest and search warrants, an Order was entered on October 25, 1978 suppressing the evidence and dismissing the indictment, Elfvin, J. The Government appealed.

On March 9, 1979 United States Court of Appeals for the Second Circuit reversed the Order suppressing the evidence seized and remanded for reinstatement of the indictment and further proceedings, in an opinion, Lumbard, Feinberg and Meskill, J.J.

STATEMENT OF FACTS

The Trial Court found that government agents lied under oath about material matters on two separate occasions relevant to this prosecution: once in applying for an arrest warrant, and again at the suppression hearing.

A. *The Investigation*

Margaret Carriger was an informant for the Federal Bureau of Investigation (FBI), and especially Special Agent (SA) Randolph Prillman, of Detroit. Carriger, while in Detroit in February of 1976, arranged by telephone to meet Petitioner Odell Broward, then in Buffalo, in Toronto, Ontario, regarding a narcotics transaction. SA Prillman notified the Ontario Provincial Police (OPP) who notified the Royal Canadian Mounted Police (RCMP) and a Canadian investigation was begun, including the use of electronic and telephonic surveillance of Broward's hotel room in Toronto. The DEA agent in Toronto, one Gill, participated in the investigation, and the DEA supplied information regarding Broward and Forbes (GA-11-12, 149-151).[1]

The surveillance of Broward in Toronto, and Carriger herself, provided information that the contemplated narcotics transaction would take place in the United States, in Buffalo, New York, involving a transfer of heroin from Forbes to Carriger (GA-15).

[1]Numbers in parentheses (GA-) refer to pages in the Government's Appendix in the proceedings below.

The Canadian investigation was terminated. Arrangements were made by the DEA for surveillance of this transaction in Buffalo. Forbes met Carriger at the Buffalo Airport, took her to a hotel in Buffalo and left, escaping surveillance efforts for the time. Forbes returned; after his departure this time Carriger delivered a quantity of heroin, which had been strapped to her body in plastic bags, to Agent Kenneth Peterson of the DEA. Carriger returned to Detroit and was met at the airport by FBI Agent Prillman (GA-15).

B. *The Arrest Warrant Application*

DEA Agents Bruce Johnson and Paul Teresi and Det. Chester Shear, a Buffalo Police Officer assigned to the DEA, met with an Assistant United States Attorney to discuss commencement of a prosecution (GA-14-15, 91-93).

In preparing an affidavit in support of the complaint and arrest warrant, these officers determined to conceal in the affidavit the informant status of Margaret Carriger. This was for her own safety, even though she had already reached Detroit and Agent Prillman (GA-55, 57-60). (The affidavit appears at GA-2-3). The method of concealment was as follows:

1. Carriger would be identified as Margaret "Carcer" in the affidavit, a name concededly not otherwise used by her.
2. Carriger would be charged as a defendant. Although she would continue to be described as Margaret "Carcer").
3. Although the material information contained in the affidavit came from Carriger, it would not be attributed to her, but would instead be attributed in part to an unnamed "reliable informant" in Detroit who had allegedly observed the heroin taped to "Carcer's" body and had been told by "Carcer" the rough details of the narcotics transaction. It is conceded that no such informant ever existed.

The affidavit and complaint charging Broward, Forbes, and "Carcer" with violations of 21 USC §846 were taken to the home of United States Magistrate Edmund F. Maxwell. There the affidavit and complaint were signed and sworn to by Agent Johnson before the Magistrate who authorized arrest warrants for all three.

C. *The Arrest and Search*

Forbes was arrested outside his apartment building, but was led by Agents Johnson, Teresi, Peterson, and Det. Shear back to his 3rd floor apartment where his wife and another woman were (GA-26-27, 63-64). After gaining admission to the apartment, observations were made by the officers which provided the basis for the application for a search warrant for the premises (Warrant appears in the Appendix, GA-4-5); the execution of the search warrant resulted in the seizure of evidence (GA-26-33).

D. *The Suppression Hearing*

Agent Johnson (known as "AAA" in the trial judge's Memorandum and Order) testified at the Suppression Hearing about the preparation of the affidavit. The agents were concerned for the safety of Margaret Carriger due to alleged threats by Petitioner against her life, which agent Johnson recalled to the Court with particularity, although without a direct or identifiable source of knowledge (GA-16). The use of a fictitious name for Carriger making her, or at least "Carcer", a co-defendant, and the inclusion of a fictitious "reliable informant" were discussed with and approved by the United States Magistrate, according to the testimony (GA-16-20).

Det. Shear ("BBB" in Judge Elfvin's Memorandum and Order) also testified about the preparation of the affidavit and the purpose of the misstatement and fictious inclusions, though he had no recollection of the particular threats against the informant recited by Johnson (GA-91-94, 109, 117).

Det. Shear also testified that the Magistrate was fully apprised of the extent of falsehood in the affidavit when the two agents appeared at Magistrate Maxwell's house, and that, knowing this, the Magistrate took the signature of Bruce Johnson on the affidavit and complaint and issued arrest warrants (GA-94, 102-103, 116, 122).

Subsequently Magistrate Maxwell testified that he had no independent recollection of the agents appearing at his house or of signing the affidavit, complaint, or warrant. He did not recall being advised that information contained in the affidavit was untrue.

The Magistrate did testify, however, that he would not have issued an arrest warrant knowing that the application contained falsehoods (GA-145). He stated further; in response to a question by Petitioner's then attorney:

> "If they had told me that there was certain information in here which while although true might not necessarily lead a person to come to a certain conclusion, as long as I know it to be true or believe it to be true and the person swears to me that the information is true I'm going to accept it but if a person says it is a falsehood, please sign it as being my true statement I'm not going to accept it.
>
> MR. DOYLE: Thank you, sir.
>
> MR. BURNS: No questions.
>
> THE COURT: All right. The bottom line probably is better put in a hypothetical question. If at this time an agent had come to you and indicated certain criminal circumstances justifying warrants for arrest and a complaint, had indicated to you at that time that there was a Government informant involved and that there were threats against that informant's life or wellbeing and that it was necessary or well warranted to deserve a cover of the situation by having a complaint issued against such informant in a false name and to have an arrest warrant issued for the informant, would you have signed a complaint against the three Defendants with a

> false name and would you have issued an arrest warrant for that person's arrest?
>
> THE WITNESS: I would not have signed a complaint against a person who I knew was given a name that had no connection with that person. If somebody came in and told me that Margaret Jones was involved in a particular case and that she was also known as Margaret Smith and we are presenting a complaint or a warrant against her in the name of Margaret Smith, as long as I have some satisfaction that she was known by either or both names I would sign a complaint assuming everything else to be true against either or both names.
>
> THE COURT: Assuming my hypothetical, if they told you that Martha Jones was the party's true name but there needed to be a cover up, would you have signed a Jane Doe arrest?
>
> THE WITNESS: I don't believe I would, sir.
>
> THE COURT: And you are saying then in this situation where if you were told the true name was Margaret Carriger and that there were threats that they wanted to cover up the situation by using the name Carcer you would not have signed it?
>
> THE WITNESS: No, sir, not on those statements. If they had said she was also known as Carcer or known to somebody as Carcer or went by that name also I may well have signed it but not if they told me there was no actual connection between the person and the name under which they asked that I sign it.
>
> THE COURT: Anything further?
>
> MR. DOBSON: No, sir.
>
> MR. DOYLE: No, sir.
>
> MR. BURNS: No.
>
> THE COURT: Thank you.
>
> (GA-145-148)[2]

[2]This text appears at pages 13-15 of the original transcript of the proceedings of November 3, 1977. These pages appear out of order, however, in the Government's Appendix, but are contained on the pages indicated above.

Johnson and Shear also testified to the arrest of Forbes outside his apartment. Although they testified that their visit to Forbes' 3rd floor apartment was based on his request to tell his wife of his arrest, Forbes gave testimony which was definitely to the contrary. (Proceedings of August 19, 1977, 761-768).[3] The officers agreed that Forbes made heavy, loud footsteps up to his apartment and that this was, in the opinion of Johnson "to warn his wife . . . that we were on the way up". (GA-63, 97, 127).

E. *The Trial Court's Findings*

Judge Elfvin stated:

> "Here an agent of the Government purposely misrepresented facts to the Magistrate and the Magistrate would not have issued the search warrant if he had known that the representation was not true." (GA-159).
>
> • • •
>
> "AAA's [Agent Johnson's] affidavit in the instant case has to be gauged as deliberate falsity and he admitted in his testimony in court that such was the fact. He deliberately and purposely named Margaret Carriger as Margaret Carcer and created for the magistrate the image of an informant known by him not to exist. AAA narrated in his affidavit that the FBI agent Prillman had told him that a reliable informant had stated that he had seen Carcer in Detroit at a time later than Forbes had been seen to have had personal contact with Carcer in Buffalo, that said informant had seen Carcer with glassine envelopes and clear plastic bags containing a brown powder taped to her body and that Carcer had told the informant that she had met and negotiated with Broward in Toronto and had travelled at Broward's direction to Buffalo where she had met Forbes and had obtained from him the heroin which was strapped to her body. The fantasy was embroidered upon by assertions as to the reliability of this non-existent informant. In fact, and as AAA well knew, another agent of the DEA had obtained the heroin from Carriger in Buffalo after Forbes had delivered the same to her and Carriger had then gone on to Detroit *sans* heroin." (GA-161).

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[3] Then they led me over to the door where Paul Teresi was trying to get in my door, and I asked him, "What are you doing?", he said, "We're going up here.", and he said . . . "Do you want to tell us what keys open this door or do you want us to break it down?", so I showed him the key to open up the door.

Q. What happened at that point?

A. We headed upstairs, we goes to the second floor, they didn't ask me what floor I lived on or anything, so we goes to the first apartment, they just went on in, they did knock but they went on in, I couldn't hear as far as a "Come on in" or anything because I was standing on the stairs coming up, right on the top stair, because Teresi is ahead, they all got their guns, and another thing, they kept pointing them guns at my head all along, you know, like the gun was just pointed at my head, this was scaring me to death, you know. (Proceedings of August 19, 1977, 762-764).

With regard to the testimony given by the agents in court, the Judge states:

> "Both told me that AAA had known the affidavit to have been false, that he had told the magistrate that it was false and in what regard it was false and that the magistrate thereupon had issued the search warrant upon the false affidavit. The magistrate was so definite and clear in his testimony under oath in the same courtroom at a later date that not only was he not advised that the affidavit was false in regard to Carriger's identity and doings but he would not then or at any time past or future issue a search warrant in such circumstances. I am directed by the above to but one conclusion and that is that the agent and the police officer knowingly gave false testimony under oath in a courtroom of the United States in an important portion of the proceeding in this case." (GA-162-163).

Thus, after hearing the testimony the trial judge concluded, as a matter of fact, that the agents concealed the truth from the Magistrate and additionally, therefore, that they lied in court while under oath.

F. *The Trial Court's Orders, and the Determinations of the Court Below.*

The Trial Court first determined that the entry into Forbes' apartment, and the observations there which provided a basis for the issuance of the search warrant, were the direct product of the arrest of Forbes' outside. Thus, the Trial Court concluded that the "search warrant's legal viability and the admissibility of the seized items are 'boot-strapped' to the legality of the arrest warrant." (GA-156).

As a result of the falsities and misrepresentations contained in the affidavit presented to the Magistrate, Judge Elfvin concluded that the arrest warrant was invalid, *Franks v. Delaware*, ____U.S.____, 98 S.Ct. 2674 (1978); and that, therefore, the "evidentiary proceeds of the execution of the search warrant must be and hereby are ordered suppressed." (GA-162).

The Court of Appeals concluded otherwise. It held that there was probable cause for the arrest at the time it was made, notwithstanding any invalidity of the arrest warrant.[4] The Court below further concluded, contrary to the determination implicit in Judge Elfvin's ruling, that the entry into the apartment was independent of the arrest and pursuant solely to the request of Forbes, that he be allowed to notify his wife of his arrest.

With respect to the testimony of the DEA Agent and Detective Shear in court, Judge Elfvin ruled further:

> "While [suppression of evidence] might be the limit of any sanction or penalty to be leveled against the government for what happened before the magistrate, much more must be done to this prosecutory endeavor

[4]Petitioner argued below that there was probable cause for the arrest, but argued that this information was not *independent* of the information contained in the arrest warrant application.

> due to the testimony given by the agent and the detective in the courtroom while under oath." (GA-162).
>
> • • •
>
> ". . . The "imperative of judicial integrity" . . . requires suppression of the evidence seized herein and amply justifies the heavy sanction of dismissal which I here impose upon and because of the in-court perjurious testimony of these two officers of the law." (GA-165).

As to this ruling, as well, the Court of Appeals reversed, concluding that dismissal of the indictment was "an inappropriate response".

It is review of this latter ruling which Petitioner now seeks.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals vitiates the power of the Trial Court to insure the integrity of the judicial process.

Courts and litigants must have the means to prevent or rectify violations of the law by prosecuting officials which occur in the judicial setting. The power of contempt is such a means, and so is the power to order the dismissal of an indictment.

One cannot argue in principle with the Second Circuit Court of Appeals when it states that the remedy of dismissal of the indictment must be reserved for extreme cases. However, in overturning the Trial Court's dismissal of the indictment in this case, the Court below has left the Petitioner and the Trial Court without a practical or effective remedy for what was found to be two instances of knowingly false and material testimony before a U.S. Magistrate and a U.S. District Court Judge.

The opinion of the Court of Appeals is not well reasoned. It states that Petitioner is not prejudiced by this particular misconduct. Such is not the case. The agents will testify at trial; because of their special status as agents of the government, and the position they enjoy with the U.S. Attorney, they have not been and will not be prosecuted for perjury or disciplined by their employer. Petitioner will, therefore, not have the opportunity to challenge the credibility of these witnesses on the basis of a prior criminal conviction or disciplinary action. In the case of a lay witness, Petitioner would be more likely to have this avenue of impeachment available.

The Court below reasoned that Petitioner now has "substantial material" with which to impeach important government witnesses if, in the face of such impeachment material, they testify at trial. How is this true? False testimony of the officers, as a specific instance of misconduct, may not be proven by extrinsic evidence. Fed.R.Evid. 608(b). Nor can it be conceived how

Judge Elfvin could give any opinion at trial of the credibility of these witnesses, independent of the specific instance of misconduct which he observed, Fed.R.Evid., 608(a), assuming he would be competent at all, Fed.R.Evid. 605.

The Court below complains "that there was no finding of widespread or continuous official misconduct of the dimensions necessary to warrant imposition of the sanction of dismissal." Not until *United States v. Fields*, No. 77-1342, slip op. at 4717 (2d Cir., September 14, 1978), a case markedly different in its facts from the instant case, was it even suggested that such a finding was a condition precedent to dismissal of indictments on grounds of prosecutorial misconduct in the Second Circuit.

Nevertheless, it is apparent that Judge Elfvin may indeed have ordered dismissal of the indictment partially as a remedy for a widespread or continuous official misconduct. Apart from the testimony concerning the search warrant application, the testimony of the officers about the arrest of Forbes was suspicious on its face and directly contradicted by Forbes. Subsequently, in addition, the testimony of one of these officers was similarly rejected by another District Court Judge in a decision not yet reported, *United States v. Kirill Stojanov*, CR-78-26 (WDNY, Dec. 21, 1978, Curtin, J).

More importantly, the daily experience of the Trial Judge with the testimony of federal agents must be presumed to have informed the exercise of his discretion in ordering a dismissal of the indictment. That such a Trial Judge is in the best position to perceive the meaning of questioned testimony and to find the facts is a cornerstone principle in our appellate judicial process.

The Court of Appeals suggests remedies other than dismissal "ranging from interdepartmental sanctions to perjury prosecutions". These remedies, however, are executive in nature, and problematic to the extent, as here, that the offender is an executive officer. The trial judiciary must not be dependent, for

preservation of order in the courtroom, upon the action of the executive branch.

The remedy of contempt against the officers may well punish them for past transgressions, but cannot prevent them from again testifying falsely against petitioner in the future, especially in light of the possibility that the case could, upon the remand ordered by the Court of Appeals, be heard before another judge.

Obviously, the Court of Appeals, from its distant vantage point, would not have exercised its discretion in the same fashion as did Judge Elfvin. They might well believe that the remedy of dismissal is "inappropriate" in this case. But to determine that the misconduct found in this case is not "extraordinarily serious" and that "therefore it was an abuse of discretion to dismiss the indictment" is such an unwarranted departure from the usual consideration given to the finding of the Trial Judge as to call for an exercise of this court's power of supervision.

CONCLUSION

For all of the above reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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DATED: April 9, 1979

Appendices

APPENDIX A
DECISION OF TRIAL COURT

MEMORANDUM and ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

ODELL BROWARD
GARY L. FORBES

CR-76-33

The abovenamed defendants were indicted March 4, 1976 in a five-count indictment charging both with having conspired earlier in 1976 to distribute heroin and charging defendant Forbes in four counts of having distributed heroin or possessed heroin. As to one of said distribution counts, defendant Broward is charged with having aided and abetted defendant Forbes.

The case had its genesis in Detroit where one Margaret Carriger had been and was acting as an informant for the Federal Bureau of Investigation ("FBI") and particularly for Special Agent Randolph G. Prillman. She had been acquainted with Broward who had convinced her to assist him in a narcotics deal. In that connection she was to and did meet Broward in Toronto February 13, 1976 at a specified hotel. Prillman alerted the Ontario (Canada) Provincial Police ("OPP") and, prior to leaving Detroit, she met and talked with an officer of the OPP. Prillman made no contact with the United States Drug Enforcement Administration ("DEA") because the transaction was supposed to take place in Canada. Carriger was most desirous of having her role and status with the FBI kept confidential

because, among other things, she was afraid of Broward. The OPP had relayed the information to the Royal Canadian Mounted Police ("RCMP") which had the prime responsibility for drug investigations in Canada. It was decided to seek authorization for surveillance of the telephone conversations to and from Broward's room in the Toronto hotel and an emergency authorization good for 36 hours was obtained. Later a regular authorization was received. The Canadian police secured an "observation room" at the hotel. The OPP, by way of "courtesy", advised Prillman that Carriger had met with Broward and others in Toronto and that there had been some talk about a narcotics transaction. Broward wanted Carriger to act as a courier for the distribution of heroin but Prillman and the Canadian police decided that the enterprise occasioned too much risk for the informant and it was agreed that she should be extricated. While the transaction had at the outset been evaluated as a wholly Canadian operation, the DEA's resident agent (Gill) in Toronto was apprised of the investigation when information concerning Broward was needed and Gill was thereafter at a time or times physically present in the observation room. The DEA cooperated with the RCMP by supplying photographs of Broward. DEA Special Agent "AAA",[1] stationed in Buffalo, was telephoned by Gill and it was AAA who physically carried Broward's photographs and record to St. Catherines which Canadian city is roughly halfway between Toronto and Buffalo and handed them over to Gill. Gill also had asked AAA to inquire concerning any airplane reservations to Toronto in Broward's name and AAA gave information concerning the same to Gill. As a result of the travel data and photographs, the Canadian law enforcement officers were able to recognize Broward at the Toronto airport and to initiate their surveillance of him.

[1]I intend not to display the individual agent's name in this opinion and will similarly treat the identity of a certain police officer.

Broward wanted Carriger's help in carrying heroin from Buffalo to Detroit and Los Angeles and threatened that he would find her wherever she went if anything went wrong. Carriger feared for her life and tried to beg off by telling Broward that her contacts were interested only in cocaine and not in heroin; however, Broward insisted that anyone who bought or used cocaine would buy or use heroin. The Canadian police, from time to time and surreptitiously, were able to confer with Carriger. It developed that a heroin deal was to "go down" in the United States, that there was a cache of heroin in Buffalo and that she was to have a transaction in heroin with Forbes in Buffalo. Consequently, the Canadian police obtained permission from Prillman for Carriger to work with the DEA on the matter and deferred to the DEA; no criminal charges were laid in Canada. Broward had telephoned Forbes' home in Buffalo from Toronto and a meeting of Broward and Forbes and Carriger was arranged for Buffalo. The DEA had joined in persuading Prillman to release Carriger for work with it and promised to assure her safety. Arrangements were made to institute and maintain a surveillance of Broward and Carriger when they reached Buffalo. Only Carriger came to Buffalo, she was met by Forbes and taken to a Buffalo hotel where her room was kept under surveillance from the time she checked in. An attempt was made to tail Forbes as he left but he employed evasive tactics and the surveillance could not be maintained. Special Agent Peterson of the DEA had registered into the room next to Carriger's and he had had voice contact with Carriger who had reported that Forbes was to return soon. Forbes did return and remained for some 45 minutes in Carriger's hotel room and, as soon as he was reported to have left the area of the hotel, Peterson went to Carriger's room; Carriger had told Peterson by telephone that she had received $5,000 worth of heroin from Forbes and that it was strapped to her body in plastic bags.

Carriger was relieved of the heroin and travelled at once to Detroit and Prillman.

AAA had been on leave and had been summoned back to Buffalo to assist in the Buffalo events. He and his superior and an attorney from the office of the United States Attorney conferred and decided that Margaret Carriger should be charged as a defendant because her life or physical well-being had been threatened and such charges would tend to "cover up" her informant status. The attorney approved the affidavit and complaint and AAA took them to the home of the United States magistrate Edmund F. Maxwell, he being out of his office on the legal holiday. With Buffalo Police Department Detective BBB[2] present, AAA (according to his and BBB's later testimony) advised the magistrate of the threats to Carriger and told him that she was a government informant, that she was identified in the documents as "Margaret Carcer" in order to aid in the coverup of her assistance to the governments of Canada and the United States and that a fictitious unnamed informant had been introduced to the narrative. The pertinent parts of AAA's supporting affidavit are as follows:

> " • • • On February 12, 1976, your deponent received information from Special Agent Frank Gill, Toronto DO, that Odell BROWARD would be traveling to Toronto, Ontario, Canada to meet with Margaret CARCER, and other unknown individuals to negotiate for the sale of a large quantity of heroin. On that date your deponent did verify that BROWARD travelled to Toronto via Allegheny Airlines.
>
> "On February 13, 1976, Margaret CARCER arrived in Toronto, Ontario, from Detroit, Michigan.
>
> "On February 13, 14, and 15, 1976, CARCER, BROWARD, and two other unidentified individuals met

[2]See note 1, *supra*.

> in CARCER'S room in [a hotel] in downtown Toronto. The RCMP told your deponent that during the course of these meetings, BROWARD told CARCER that she was to travel to Buffalo, New York and pick up a sample package. CARCER told BROWARD that she had customers in Detroit and California.
>
> "The RCMP told your deponent that on February 14, 1976, BROWARD contacted Gary FORBES in Buffalo, New York, and directed him to prepare a special sample for one. BROWARD further told FORBES that CARCER was negotiating for at least a hundred thousand dollars worth, and a special package of "pure" and a five thousand dollar package was needed for the customers in Detroit. Broward told FORBES that CARCER would be arriving in Buffalo, New York, on February 15, 1976 via Allegheny Flight #804, which would arrive in Buffalo at about 1:59 PM and that he (FORBES) should pick up CARCER at the airport. BROWARD directed FORBES to rent a room at [a certain hotel in] Buffalo, New York, and that the transaction would take place there.
>
> "Special Agent Kenneth B. Peterson told your deponent that on February 15, 1976, at about 1:55 PM, CARCER arrived at the Buffalo International Airport and was met by FORBES. FORBES AND CARCER were followed by agents of the Buffalo District Office, DEA, to the [hotel].
>
> "At about 2:35 PM, Agent Peterson observed FORBES exit the [hotel], enter his vehicle and drive in a circuitous manner to the vicinity of Tupper and Franklin sts, Buffalo, where the surveillance was discontinued due to his extremely evasive driving techniques.
>
> "Your deponent was advised by Special Agent Peterson that CARCER had registered in Room 414 in the [hotel].
>
> "At about 4:15 PM, Forbes was observed arriving at the [hotel] carrying a dark colored briefcase, and enter CARCER'S room. At about 5:20 PM, FORBES left the [hotel] and drove in an evasive and circuitous manner to the parking lot of Audrey and Dell's Records, Walnut and

Broadway, where he parked his vehicle and was observed entering 362 Broadway.

"On February 16, 1976, your deponent was advised by Special Agent Randy Pillman [sic], FBI, Detroit Office, that a reliable informant stated that he had seen Margaret CARCER on the evening of February 15, 1976, in Detroit, Michigan. This reliable informant told Agent Pillman that he had seen brown powder contained in two separate glassine envelopes and an additional two clear plastic bags containing brown powder, all taped to CARCER's body with brown tape. This informant told Agent Pillman that CARCER had stated that she had met and negotiated with Odell BROWARD in Toronto, Ontario, and had subsequently, on February 15, 1976, travelled to Buffalo, N.Y. at his (BROWARD's) direction and met with and obtained the heroin which was taped to her body from Gary FORBES.

"The above reliable informant is considered reliable based on the following; information furnished by the informant to Agent Pillman has resulted in two active investigations by the FBI into program frauds in the Detroit area, and six active investigations into illegal gambling, extortion and prostitution in Detroit, Michigan and Los Angeles, California. * * * "

Arrest warrants were obtained for all three. A complaint issued against Broward and Forbes and "Carcer" for having violated the drug laws of the United States (the particular criminal event being a transfer of a certain amount of heroin from Forbes to "Carcer" at the Buffalo hotel). Forbes was arrested in front of an apartment building and, when Forbes indicated that he wanted personally to tell his wife of this happening, he was escorted by DEA agents to his apartment. The agents from the apartment doorway saw marihuana and hashish and a pipe. AAA and two other agents entered the apartment with Forbes. AAA telephoned the office of the United States Attorney and then departed with officer BBB of the

Buffalo Police Department to procure the search warrant now sought to be quashed. The execution of the search warrant had produced various items of drugs and drug-cutting and packaging equipment which is sought to be suppressed as evidence. The search warrant's legal viability and the admissibility of the seized items thus are "bootstrapped" to the legality of the arrest warrant.

AAA testified under oath in court that he and his brother agents were, at the time he and BBB went to the magistrate's home to swear out the complaint and secure the arrest warrants, concerned about Carriger's safety even though she had departed from Buffalo and had reached Detroit and the FBI agent whose informant she was. There had been threats made against her by Broward and AAA testified that the existence of these threats and the risk to Carriger's well-being were fully explained to the magistrate who had questioned AAA concerning both. AAA testified that he had advised the magistrate that a false name and fictitious informant were being employed in the affidavit and in the complaint and arrest warrants and that the magistrate had thereafter allowed the use of the false name. BBB testified that the mechanism of protecting Carriger by naming her as a co-defendant but with a false name was discussed with and cleared by the United States Attorney's office, that he had gone with AAA to the magistrate's home, that the magistrate had questioned AAA and BBB for about one hour, that the magistrate was advised of the danger to Carriger and of her being referred to as Carcer. The magistrate, AAA and BBB testified, was told the true facts and that Carcer was a false name and that there was no additional informant despite the specific statement in the affidavit that "a reliable informant" had told the FBI in Detroit that he had seen Margaret Carcer in Detroit with plastic bags containing a brown powder taped to her body. After such testimony before me by AAA and BBB, the

magistrate himself was called to the witness stand and related that, while he had no independent recollection of the events attending the issuance of the arrest warrants, there had been at some time conversations about the female defendant but that he would not have signed the complaint if he had known that the affidavit was not true. He was questioned closely by the court and insisted that he never would issue a warrant upon known misrepresentations.

Counsel for the Government has placed reliance on the March 7, 1978 decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Kahan,* 572 F.2d 923, *cert. denied,* 47 U.S.L.W. 3189 (October 3, 1978), wherein the effect of a mis-statement in an affidavit for a search warrant was considered. *Id.*, pp. 930-2. That matter came to the appellate court after the trial judge had denied a motion to suppress the evidence seized pursuant to the search warrant and the defendants had been convicted upon ample supporting evidence of charges of having received goods which had been stolen from interstate commerce and which defendants knew to have been stolen. An interstate shipment had been hijacked and an informant for the FBI had been enlisted by the defendants to help to transfer the goods into warehouses. On a certain day, the informant said, part of the goods had been moved into two particular warehouses, one of which later was the subject of the search warrant; the agent misconstrued such information, thinking and stating that the informant had been in the later-searched warehouse.[3] The trial judge had found the disparity between the erroneous material statement (that the informant had been inside the warehouse on the first day) and the true statement (that the informant had delivered part of the goods on

[3]By the time of the actual issuance of the search warrant on the following day, the informant actually had been in the warehouse in question and had participated in unloading there a further portion of the hijacked goods.

that day to another warehouse while others had delivered another portion to the warehouse in question) to be immaterial. The statement in the affidavit was, he held, not materially wrong and the appellate court affirmed. There was no consideration whether the magistrate would not have issued the search warrant if he had been told the truth or, importantly to my consideration, whether he would not have issued the search warrant had he been informed that the statement in the affidavit that the informant had actually been at the warehouse to be searched was false and that the truth was that the informant had been at a different warehouse and only had been told that others were taking goods to the later-searched warehouse. As the foregoing demonstrates, it is difficult to bring the *Kahan* decision to a point of any applicability to the instant facts. Here an agent of the government purposely misrepresented facts to the magistrate and the magistrate would not have issued the search warrant if he had known that the representation was not true.

The government has invited my attention to the June 26, 1978 opinion of the United States Supreme Court in *Franks* v. *Delaware,* ____U.S.____, 98 S.Ct. 2674. Therein the holding of the Supreme Court of Delaware that no attack upon the veracity of a search warrant could be made was reversed and remanded for further consideration. The falsity in the affidavit made to the magistrate was claimed to be that the affiant had stated that certain material information had been related to him by a specified lay person whereas, in fact, such person never had talked with the affiant but may have given "somewhat different" information to another police officer. The highest court stated the following (*Id.*, at pp. 2681-2):

> "In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its

premise: '[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation . . .' Judge Frankel, in *United States* v. *Halsey,* 257 F.Supp. 1002, 1005 (S.D.N.Y. 1966), aff'd, Docket No. 31369 (CA2 1967) (unreported), put the matter simply: '[W]hen the Fourth Amendment demands a factual showing sufficient to comprise "probable cause," the obvious assumption is that there will be a *truthful* showing' (emphasis in original). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law, *see Nathanson* v. *United States,* 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933); *Giordenello* v. *United States,* 357 U.S. 480, 485-486, 78 S.Ct. 1245, 1249-1250, 2 L.Ed.2d 1503 (1958); *Aguilar* v. *Texas,* 378 U.S. 108, 114-115, 84 S.Ct. 1509, 1513-1514, 12 L.Ed.2d 723 (1964), that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite 'some of the underlying circumstances from which the informant concluded' that relevant evidence might be discovered, and 'some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible" or his information "reliable." ' *Id.,* at 114, 84 S.Ct., at 1514. Because it is the magistrate who must determine independently whether there is probable cause, *Johnson* v. *United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948); *Jones* v. *United States,* 362 U.S. 257, 270-271, 80 S.Ct. 725, 735-736, 4 L.Ed.2d 697 (1960), it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after

> the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment.[7]

Deliberate falsity or reckless disregard of the truth by the affiant can, the Supreme Court held, be attacked and such would negate the authority of the search warrant unless, absent the false statements, there remained probable cause to support the issuance of the warrant. Mere negligence on the part of the police in checking or recording the facts relevant to a probable cause determination would not be sufficient to set aside the magistrate's determination. AAA's affidavit in the instant case has to be gauged as deliberate falsity and he admitted in his testimony in court that such was the fact. He deliberately and purposely named Margaret Carriger as Margaret Carcer and created for the magistrate the image of an informant known by him not to exist. AAA narrated in his affidavit that the FBI agent Prillman had told him that a reliable informant had stated that he had seen Carcer in Detroit at a time later than Forbes had been seen to have had personal contact with Carcer in Buffalo, that said informant had seen Carcer with glassine envelopes and clear plastic bags containing a brown powder taped to her body and that Carcer had told the informant that she had met and negotiated with Broward in Toronto and had travelled at Broward's direction to Buffalo where she had met Forbes and had obtained from him the heroin which was strapped to her body. The fantasy was embroidered upon by assertions as to the reliability of this non-existent informant. In fact, and as AAA well knew, another agent of the DEA had obtained the heroin from Carriger in Buffalo after Forbes had delivered the same to her and Carriger had then gone on to Detroit sans heroin. Absent some statement evidencing delivery of the drugs by Forbes to Carriger, the existence of probable cause for the issuance of the arrest warrant becomes problematic and conjectural (although theoretically the crime of a conspiracy to violate the drug laws of the United States could be spelled out

together with one or more overt acts, unnecessary though any such overt acts may be to a violation of 21 U.S.C. §846).

The evidentiary proceeds of the execution of the search warrant must be and hereby are ORDERED suppressed.

While such might be the limit of any sanction or penalty to be leveled against the government for what happened before the magistrate, much more must be done to this prosecutory endeavor due to the testimony given by the agent and the detective in the courtroom while under oath. Both told me that AAA had known the affidavit to have been false, that he had told the magistrate that it was false and in what regard it was false and that the magistrate thereupon had issued the search warrant upon the false affidavit. The magistrate was so definite and clear in his testimony under oath in the same courtroom at a later date that now only was he not advised that the affidavit was false in regard to Carriger's identity and doings but he would not then or at any other time past or future issue a search warrant in such circumstances. I am directed by the above to but one conclusion and that is that the agent and the police officer knowingly gave false testimony under oath in a courtroom of the United States in an important portion of the proceeding in this case.[4]

As was stated in *United States* v. *McCord*, 509 F.2d 334 (D.C. Cir. 1974), *cert. denied sub nom*, McCord, a/k/a Warren et al. *v.* United States, 421 U.S. 930 (1975), "serious prosecutional misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused" and "courts have ordered new trials when the prosecution has knowingly used perjured testimony".

[4]I have not approached this conclusion via any inquiry whether a reasonable person would or could have a reasonable doubt as to the agent's or the officer's liability for perjury.

(509 F.2d, at 349). In *United States* v. *Heath*, 260 F.2d 623 (9th Cir. 1958), the trial court's dismissal of the indictment because the government did not produce before trial certain documents which were deemed necessary to the defense was upheld. The documents were claimed to have been obtained from defendant by agents of the Internal Revenue Service and not returned. Defendant was not able to show any receipt for the documents but the court concluded after a hearing that they had been turned over to the agents but had been lost and could not be produced. The government claimed that it never had received the particular documents. The court directed that a motion to dismiss be filed; the motion, which stated no ground for dismissal, was filed and granted. It was held "that a federal judge is not a mere automaton steering a course or deflected therefrom by mechanical or electronic devices" but that "his office is judicial and requires the exercise of discretion in extremely delicate situations." *Id.*, at 625-6. The government's argument on appeal that it should not matter by whose hand or fault the documents were lost was "emphatically rejected", the court holding that "agents should not act an ignoble part." (*Id.*, at 629.) I find the actions of AAA and BBB in coming openly and boldly into a criminal proceeding and there blatantly relating material false testimony at least as ignoble an action as was faced in *Heath*. While there was in *Heath* the consideration of the alleged inability of the defendant to meet the charges without the documents, such inability is not a *sine qua non* to the end there achieved. I find sufficient basis for the dismissal hereby ordered by me in the need to impose sanctions for the gross misbehavior exhibited in a federal courtroom by this federal agent and this police officer. I could protect defendants merely by suppressing all evidence resulting from the arrest of Forbes and the subsequent inspection and searching of his apartment; such would, however, merely say to these and other governmental agents that they suffer only a mild if any reproach

and detriment to their prosecution by resorting to ignoble action. To suppress such evidence and allow the prosecution to proceed to trial would be, in my judgment, comparable to allowing a thief who upon apprehension yields up the stolen goods to go free. As was cogently noted in *Franks* v. *Delaware, supra,* at p. 2683:

> "The requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile."

The law expects that sanctions and punishments will be imposed for wrongdoing regardless of whether someone has been damaged thereby. Admittedly, exclusion was thought in *Elkins* v. *United States,* 364 U.S. 206 (1960), to be the only effectively available way to compel respect for the constitutional guaranty against unreasonable searches and seizures by removing the incentive to disregard it. (*Id.,* at 217.) I construe *Elkins* as holding that exclusion as a minimum is required in the circumstance and not as forbidding a trial judge in his considered exercise of discretion to do more. The "imperative of judicial integrity" (*Id.,* at 222) requires suppression of the evidence seized herein and amply justifies the heavy sanction of dismissal which I here impose upon and because of the in-court perjurious testimony of these two officers of the law.

It hereby is ordered that the within Indictment is dismissed.

Dated: Buffalo, N.Y.
October 25, 1978

/s/JOHN T. ELFVIN
U.S.D.J.

APPENDIX B
DECISION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 602—August Term, 1978.

(Argued January 22, 1979 Decided March 9, 1979.)

Docket No. 78-1409

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—against—

ODELL BROWARD and GARY L. FORBES,

Defendants-Appellees.

Before:

LUMBARD, FEINBERG and MESKILL,

Circuit Judges.

Appeal by government from order of United States District Court for the Western District of New York, Elfvin, J., suppressing certain evidence and dismissing narcotics indictment.

Reversed.

EDWARD J. WAGNER, Assistant United States Attorney, Buffalo, N.Y. (Richard J. Ar-

cara, United States Attorney, Western District of New York, of counsel), *for Plaintiff-Appellant.*

MARK J. MAHONEY, Buffalo, N.Y. (Diebold, Bermingham, Gorman, Brown & Bridge, Buffalo, N.Y., of counsel), *for Defendant-Appellee Broward.*

ARTHUR F. DOBSON, Buffalo, N.Y. (Parrino, Cooper, Butler & Dobson, Buffalo, N.Y., of counsel), *for Defendant-Appellee Forbes.*

FEINBERG, *Circuit Judge:*

This is an appeal by the United States, pursuant to 18 U.S.C. § 3731, from an order of Judge John T. Elfvin of the United States District Court for the Western District of New York suppressing certain evidence and dismissing a five-count narcotics indictment. Appellees Broward and Forbes were charged with conspiring to distribute heroin, 21 U.S.C. §§ 841, 846; Forbes alone was charged with distributing and possessing both heroin and marihuana, 21 U.S.C. §§ 841, 844; and Broward was charged with aiding and abetting Forbes's distribution of heroin, 18 U.S.C. § 2. For the reasons stated below, we reverse the order of the district court and reinstate the indictment.

I

We begin by summarizing the facts, which, except where indicated, are those found by Judge Elfvin in his memorandum opinion that dismissed the indictment. Margaret Carriger, who had been acting as an FBI informant in Detroit for Special Agent Prillman, knew appellee

Broward. Broward convinced Carriger to assist him in a narcotics deal. To that end, or so Broward thought, she met Broward at a hotel in Toronto. Prior to leaving Detroit, however, Carriger spoke with an officer of the Ontario Provincial Police (OPP), who had been contacted by Prillman. The OPP in turn informed the Royal Canadian Mounted Police (RCMP), who have primary responsibility for drug investigations in Canada. The Canadian authorities secured an "observation room" at the Toronto hotel as well as wiretap authorization. Based on this surveillance, the OPP told Prillman that Carriger had met with Broward and discussed a narcotics transaction. Agent Gill of the United States Drug Enforcement Agency (DEA), residing in Toronto, was contacted. He supplied the Canadian authorities with photographs of Broward obtained from DEA agents in Buffalo, New York, and was also present at various times in the "observation room."

Appellee Broward wanted Carriger's help in transporting heroin from Buffalo to Detroit and Los Angeles. He also threatened Carriger that he would find her wherever she went if anything went wrong, and Carriger feared for her life. There was testimony in the suppression hearing before Judge Elfvin that Broward said he would "[cut] her into little pieces and [flush] her down the toilet." Because of the risk to Carriger, both Prillman and the Canadian authorities agreed that she should be extricated from the situation.

The Canadian police learned from surreptitious conferences with Carriger that she was to purchase heroin from appellee Forbes in Buffalo. No criminal charges were laid in Canada, since no transactions were to occur there, and arrangements were made for Carriger to work with the DEA, who promised Prillman they would assure her safety. Carriger went to Buffalo where she was met by

Forbes, who drove her to a Buffalo hotel. An attempt was made to tail Forbes after he left the hotel, but he successfully used evasive driving tactics. DEA agent Peterson registered in the room next to Carriger's and made voice contact with her. Carriger told him Forbes would return soon. Forbes returned to Carriger's room and remained for forty-five minutes. After Forbes left, Peterson went to Carriger's room. She told Peterson that she had received $5,000 worth of heroin from Forbes, and that it was strapped to her body in plastic bags. She was then relieved of the heroin, whereupon she immediately left for Detroit and the protection of agent Prillman.

Buffalo DEA agents and an attorney from the United States Attorney's office determined that in seeking an arrest warrant for appellees Broward and Forbes, it was necessary to "cover up" Margaret Carriger's informant status in order to assure her safety. Thus, in the affidavit presented to the United States Magistrate, Margaret Carriger was characterized as a co-defendant and was referred to throughout as "Margaret Carcer," and a fictitious "reliable informant" was introduced into the narrative as the source of information that in fact came from Carriger.[1] The pertinent parts of the affidavit read as follows:

> On February 12, 1976, your deponent received information from Special Agent Frank Gill, Toronto DO, that Odell BROWARD would be traveling to Toronto, Ontario, Canada to meet with Margaret CARCER, and other unknown individuals to negotiate for the sale of a large quantity of heroin. On that date your

1 Apparently, though we can only surmise, the intended effect of the affidavit was to fool appellees, if they found out about the affidavit, into thinking that the government agents hardly knew Margaret Carriger.

> deponent did verify that BROWARD travelled to Toronto via Allegheny Airlines.
>
> On February 13, 1976, Margaret CARCER arrived in Toronto, Ontario, from Detroit, Michigan.
>
> On February 13, 14, and 15, 1976, CARCER, BROWARD, and two other unidentified individuals met in CARCER'S room in the Four Seasons Sheraton, in downtown Toronto. The RCMP told your deponent that during the course of these meetings, BROWARD told CARCER that she was to travel to Buffalo, New York and pick up a sample package. CARCER told BROWARD that she had customers in Detroit and California.
>
> The RCMP told your deponent that on February 14, 1976, BROWARD contacted Gary FORBES in Buffalo, New York, and directed him to prepare a special sample for one. BROWARD further told FORBES that CARCER was negotiating for at least a hundred thousand dollars worth, and a special package of "pure" and a five thousand dollar package was needed for the customers in Detroit. Broward told FORBES that CARCER would be arriving in Buffalo, New York, on February 15, 1976 via Allegheny Flight #804, which would arrive in Buffalo at about 1:59 PM and that he (FORBES) should pick up CARCER at the airport. BROWARD directed FORBES to rent a room at the Holiday Inn, Delaware Avenue, Buffalo, New York, and that the transaction would take place there.
>
> Special Agent Kenneth B. Peterson told your deponent that on February 15, 1976, at about 1:55 PM, CARCER arrived at the Buffalo International Airport

and was met by FORBES. FORBES AND CARCER were followed by agents of the Buffalo District Office, DEA, to the Holiday Inn, 620 Delaware Ave., Buffalo, New York.

At about 2:35 PM, Agent Peterson observed FORBES exit the Holiday INN, enter his vehicle and drive in a circuitous manner to the vicinity of Tupper and Franklin sts, Buffalo, where the surveillance was discontinued due to his extremely evasive driving techniques.

~~On February 16, 1976,~~ your deponent was advised by Special Agent Peterson that CARCER had registered in Room 414 in the Holiday Inn.

At about 4:15PM Forbes was observed arriving at the Holiday Inn carrying a dark colored briefcase, and enter CARCER'S room. At about 5:20PM, FORBES left the Holiday Inn, and drove in an evasive and circuitous manner to the parking lot of Audrey and Dell's Records, Walnut and Broadway, where he parked his vehicle and was observed entering 362 Broadway.

On February 16, 1976, your deponent was advised by Special Agent Randy Pillman, FBI, Detroit Office, that a reliable informant stated that he had seen Margaret CARCER on the evening of February 15, 1976, in Detroit, Michigan. This reliable informant told Agent Pillman that he had seen brown powder contained in two separate glassine envelopes and an additional two clear plastic bags containing brown powder, all taped to CARCER's body with brown tape. This informant told Agent Pillman that CARCER had stated that she had met and negotiated

with Odell BROWARD in Toronto, Ontario, and had subsequently, on February 15, 1976, travelled to Buffalo, N.Y. at his (BROWARD's) direction and met with and obtained the heroin which was taped to her body from Gary FORBES.

The above reliable informant is considered reliable based on the following:

information furnished by the informant to Agent Pillman has resulted in two active investigations by the FBI into program frauds in the Detroit area, and six active investigations into illegal gambling, extortion and prostitution in Detroit, Michigan and Los Angeles, California.

Arrest warrants were then obtained from the Magistrate for Broward, Forbes and "Carcer." There was a conflict in the testimony at the suppression hearing, however, as to whether the government agents disclosed to the Magistrate at that time that some of the material inserted in the affidavit was false, in order to protect Carriger. A DEA agent and a Buffalo Police Department detective testified that the Magistrate was informed in detail. The Magistrate testified, however, that while he had no specific recollection of whether he was so apprised or not, in response to a hypothetical question from Judge Elfvin, he stated quite positively that he would not have signed an arrest warrant based on intentional misstatements of fact. Judge Elfvin credited the Magistrate's testimony, and discredited that of the DEA agent and the Buffalo detective, and thus found as a fact that the Magistrate was not told of the partial falsifications in the affidavit.

Forbes was then arrested in front of his apartment building, and when he indicated that he wanted person-

ally to tell his wife of the arrest, the DEA agents escorted him to his apartment. From the apartment doorway, the agents saw in plain view marihuana, hashish and a pipe. While two agents waited in the apartment, the DEA agent and the Buffalo detective, whose testimony at the suppression hearing conflicted with the Magistrate's as just described, left to procure a search warrant. The affidavit for the search warrant recited that the DEA agent saw "marijuana, cutting and packaging material, all laying in plain view on the kitchen counter which is directly across from the entrance to the apartment." From the record, it appears that the execution of the search warrant led to the seizure of a quantity of heroin and marihuana, as well as various pieces of narcotics paraphernalia. It is this evidence that was ordered suppressed.

II

In ruling that the evidence seized pursuant to the search warrant must be suppressed, Judge Elfvin held that admissibility of the evidence was "'bootstrapped' to the legality of the arrest warrant." Drawing on the recent Supreme Court decision in *Franks v. Delaware*, 46 U.S.L.W. 4869 (June 26, 1978), Judge Elfvin held that the arrest warrant was invalid. *Franks v. Delaware* establishes the proposition that for a search warrant to be valid, it cannot be based on deliberate or recklessly asserted false statements of the affiant in the affidavit that purports to set forth probable cause. If, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable

cause was lacking on the face of the affidavit." 46 U.S.L.W. at 4870. Judge Elfvin, applying these principles to the affidavit for the arrest warrant here, ruled that after excising the false statements, "the existence of probable cause for the issuance of the arrest warrant becomes problematic and conjectural. . . ." Therefore, he concluded, he had to suppress the evidence obtained by execution of the search warrant.

We need not decide whether Judge Elfvin correctly applied *Franks v. Delaware* because we believe he proceeded on a false premise in ruling that the admissibility of the evidentiary proceeds of the search warrant was inexorably tied to the legality of the arrest warrant. The seizure was made pursuant to a search warrant. The affidavit in support of the search warrant clearly recites probable cause to justify a search, in that the agent procuring the warrant had "observed marijuana, cutting and packaging material, all laying in plain view . . . ." Appellees challenge neither the reasonableness of the agent's conclusions nor his good faith belief as to what he saw, and therefore do not question that there was apparent probable cause for the issuance of the search warrant.

Appellees' basis for challenging the seizure, therefore, is that the requirement of the plain view doctrine, that "the agents must be lawfully on the premises," *United States v. Berenguer*, 562 F.2 206, 210 (2d Cir. 1977), construing *Coolidge v. New Hampshire*, 403 U.S. 443, 464-71 (1971) (plurality opinion), was not met, or, put another way, that the viewing of the contraband by the agents was the fruit of an illegal arrest. By either statement of the theory, the legality of the seizure is "bootstrapped" to the overall legality of the arrest, not merely, as Judge Elfvin stated, to the legality of the arrest warrant.

The distinction is crucial because the arrest was legal if the arresting officers had probable cause to make the arrest. *United States v. Watson*, 423 U.S. 411 (1976). This is so even if the arrest warrant was invalid. See, e.g., *Mayer v. Moeykens*, 494 F.2d 855, 858 (2d Cir.), cert. denied, 417 U.S. 926 (1974); *United States v. Hall*, 348 F.2d 837, 841-42 (2d Cir.), cert. denied, 382 U.S. 947 (1965). See also *Giordenello v. United States*, 357 U.S. 480, 488 (1958), suggesting that in the event of a new trial in that case, the government could seek to justify the petitioner's arrest without relying on the warrant just held invalid. Appellees do not claim that the arresting officers lacked probable cause. Indeed they could not, since it is obvious from the facts found by Judge Elfvin that the arresting officers were in possession of ample facts from trustworthy sources to warrant prudent men in believing that appellees had committed an offense. See *Beck v. Ohio*, 379 U.S. 89, 91 (1964). As Judge Elfvin commented during the suppression hearing, probable cause for the arrest was "super abundant." Therefore, the arrest was legal even if the arrest warrant was not. The search was not the fruit of an illegal arrest because the arrest was legal. When the agents viewed the contraband from Forbes's doorway, after accompanying Forbes there following his request that he go to his apartment to inform his wife of the arrest, they were on premises where they had a lawful right to be, and thus the requirements of the plain view doctrine were fully met. Appellees argue to us that Forbes did not request to go to his apartment to inform his wife, but rather that government agents led him there. Judge Elfvin found otherwise, however, and since that finding was supported by the record, we see no reason to disturb it on appeal.

III

We now turn to the issue whether Judge Elfvin abused his discretion in dismissing the indictment because of misconduct by the government found by him to have occurred in this case. Specifically, the question is whether the most serious misconduct found, the false testimony by government witnesses at the suppression hearing, justifies the drastic remedy of dismissal.

In *United States v. Fields*, No. 77-1342, slip op. at 4717 (2d Cir. Sept. 14, 1978), Judge Timbers pointed out for this court that we have upheld the dismissal of an indictment only in very limited and extreme circumstances. In such cases, there was a need either to eliminate prejudice to a defendant in a criminal prosecution, where it was impossible to do so by imposition of lesser sanctions, or to deter a pattern of demonstrated and long-standing widespread or continuous official misconduct. Id. at 4733-35, discussing such prior opinions of this court as *United States v. Jacobs*, 531 F.2d 87 (2d Cir.), vacated and remanded, 429 U.S. 909, aff'd on remand, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 46 U.S.L.W. 4406 (May 1, 1978), and *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). See also *United States v. Lai Ming Tanu*, No. 78-1255, slip op. at 271, 278 (2d Cir. Nov. 17, 1978). While these may not be the only conceivable circumstances in which we would uphold a dismissal, cf. *United States v. McCord*, 509 F.2d 334, 348-51 (D.C. Cir. 1974) (en banc) (dictum), cert. denied, 421 U.S. 930 (1975), we emphasize here, as was emphasized in *Fields*, that the sanction is so drastic that, especially where serious criminal conduct is involved, it must be reserved for the truly extreme cases.

This is not such a case. Appellees suffered no prejudice by the misconduct that was found to have occurred. There is no claim that the grand jury that indicted appellees was misled in any way. As stated in Part II, there was ample probable cause for the arrest. No evidence was gathered that would not have been obtained absent the misconduct. If anything, the appellees might even have been advantaged by the entire sequence of events. The misstatements in the affidavit weakened, rather than strengthened, the showing of probable cause to the Magistrate. Also, appellees now have substantial material with which to impeach important government witnesses if, in the face of such impeachment material, they testify at trial. As for deterrence of official misconduct as a justification, we note that there was no finding of widespread or continuous official misconduct of the dimensions necessary to warrant imposition of the sanction of dismissal.

We emphatically do not condone the insertion of false material into affidavits for arrest or search warrants. Such an egregious practice defeats the whole point of the procedure, having a judicial officer make an independent assessment of whether probable cause exists. See *Franks v. Delaware*, supra, 46 U.S.L.W. at 4872. Obviously, other methods for protecting informants can be devised. We trust, however, that what occurred here was an isolated instance of erroneous judgment and that it will not recur. We regard as even more serious the lying in court by government officials, which is what Judge Elfvin found had occurred. However, we think dismissal of the indictment was an inappropriate response. There are other disciplinary measures, ranging from intradepartmental sanctions to perjury prosecutions, that could be imposed if warranted. There is simply no need to thwart the public interest in prosecuting serious crimes unless the govern-

ment misconduct is widespread or extraordinarily serious. This was not the case here, and therefore it was an abuse of discretion to dismiss the indictment.

In sum, we reverse the order suppressing the evidence seized, and we remand for reinstatement of the indictment and further proceedings consistent with this opinion.

LUMBARD, *Circuit Judge*, (concurring and dissenting):

Although I agree that the indictment should be reinstated and the order suppressing the evidence reversed, I cannot agree that there was any basis for the district court's finding that the agents had sworn falsely at the suppression hearing. The agents testified that when they were applying for the arrest warrants for Broward and Forbes, they had explained to the magistrate that the name "Carcer" was fictitious and that the fiction of an informant was necessary to protect Carriger, whose life had been threatened by Broward. However misguided their method of protecting Carriger, there can be no doubt that their motives were proper. There was no reason for them not to advise the magistrate of the true facts. Although the magistrate remembered talking to the agents for almost two hours on the day he issued the warrants, he testified that he could not remember the details of his meeting with the agents. The magistrate also expressed the opinion that he would not have issued a warrant had he known that it contained misstatements. The testimony of the magistrate was equivocal and speculative and not "definite and clear" as the district judge thought. Indeed, in light of the district judge's at-

titude, the magistrate's testimony seems to have been far more self-protective than enlightening. I would hold the district court's finding that the agents had lied to be clearly erroneous.

APPENDIX C
FEDERAL RULES OF EVIDENCE

Rule 605.

COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 608.

EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

No. 78-1535

In the Supreme Court of the United States

OCTOBER TERM, 1978

ODELL BROWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-15 to A-28) is reported at 594 F.2d 345. The opinion of the district court (Pet. App. A-1 to A-14) is reported at 459 F. Supp. 321.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1979. The petition for a writ of certiorari was filed on April 9, 1979 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly dismissed an indictment on the ground that two government agents gave false testimony at a pretrial suppression hearing.

STATEMENT

In an indictment filed in the United States District Court for the Western District of New York, petitioner was charged with conspiracy and aiding and abetting the distribution of heroin, in violation of 21 U.S.C. 846 and 841(a)(1). After a pretrial hearing, the district court found that two agents of the Drug Enforcement Administration had given false testimony at the hearing, and it ordered the suppression of certain evidence and the dismissal of the indictment against petitioner and his co-defendant (Pet. App. A-1 to A-14). On the government's appeal, the court of appeals reversed the suppression order and remanded the case for reinstatement of the indictment (Pet. App. A-15 to A-28).[1]

1. The relevant facts are set forth in detail in the court of appeals' opinion. Briefly, on February 16, 1976, the government sought arrest warrants for petitioner, co-defendant Forbes, and one "Margaret Carcer" (Pet. App. A-21). The complaint and accompanying affidavit contained information from a "reliable informant" concerning the narcotics-related activities of petitioner, Forbes, and "Carcer" (Pet.

[1] The court of appeals ordered reinstatement of the indictment against both petitioner and his co-defendant, Gary L. Forbes.

App. A-18 to A-21). In fact, however, the name "Margaret Carcer" was a deliberate misspelling of the name of the government's informant, Margaret Carriger (Pet. App. A-16 to A-18). The concealment of Carriger's role as an informant was intended to protect Carriger, who had been threatened by petitioner (Pet. App. A-17 to A-18). On the basis of the complaint and affidavits, a federal magistrate signed all three arrest warrants, although the warrant for the arrest of "Carcer" was apparently withheld from the marshal. Forbes was arrested on the street in front of his house, and he asked to return briefly to his apartment. The DEA agents who accompanied him observed marijuana and hashish lying in plain view in his apartment (Pet. App. A-21 to A-22). A search warrant for his apartment was then obtained, and additional quantities of narcotics and paraphernalia were seized (Pet. App. A-22).

2. At a pretrial suppression hearing, the arresting DEA agent and a Buffalo police detective who assisted him both testified that when they presented the complaints and warrants to the magistrate they had informed him about their concern for Carriger's safety and had explained that her identity was being masked in order to make it appear that she was not the informant (Pet. App. A-21, A-27). Although the magistrate who issued the warrants had no independent recollection of whether he had been so informed, he stated, in response to a hypothetical question, that he would not have signed the warrants if he had known that they included false information

(*ibid.*). The district judge, who credited the testimony of the magistrate and disbelieved the two investigating officers, held that the arrest warrant was invalid because of the false statements in the affidavits. He ordered the evidence seized in Forbes' apartment to be suppressed because the "legality of the search warrant and the admissibility of the seized items [were] 'bootstrapped' to the legality of the arrest warrant" (Pet. App. A-7). Because the arrest warrants were improperly obtained, the court held, the subsequent search warrant was unlawfully derived as well. The district court also found that the agent and the police officer had perjured themselves when they testified that they had informed the magistrate of the misstatements in the complaint. As a remedy for this misconduct, the court dismissed the indictment (Pet. App. A-12 to A-14).

3. The court of appeals reversed (Pet. App. A-15 to A-28). It held, first, that the inclusion of the erroneous statements in the affidavit for Forbes' arrest warrant did not require suppression of the evidence seized at Forbes' apartment at the time of his arrest (Pet. App. A-22 to A-24). The court concluded that Forbes' arrest in a public place was lawful because there was " 'super abundant' " probable cause, and accordingly the evidence found in plain view at the time of the arrest was lawfully seized (Pet. App. A-22 to A-24).[2] Second, the court held (Pet. App. A-25 to A-27) that the district court had

[2] Petitioner does not here challenge that portion of the decision below.

abused its discretion in dismissing the indictment because the defendants had suffered no prejudice from the agents' alleged perjury,[3] and there had been no showing that the agents' conduct was sufficiently "widespread or extraordinarily serious" to require the drastic remedy of dismissal (Pet. App. A-26 to A-27).

ARGUMENT

1. Petitioner's effort to obtain review of the decision reinstating the indictment should be rejected as premature. If the district court had denied petitioner's motion to dismiss the indictment, its ruling would not have been subject to interlocutory appeal. *United States* v. *MacDonald*, 435 U.S. 850 (1978); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); cf. *Abney* v. *United States*, 431 U.S. 651 (1977). Since the court of appeals' reinstatement of the indictment puts petitioner in the same position as would the district court's denial of his motion, there is no need to delay the trial by reviewing the case before final judgment. Petitioner may be acquitted at trial, in which case his claim will be moot.

[3] Judge Lumbard, concurring in the reversal of the district court's order, dissented from the majority's acceptance of the lower court finding that the agents had lied under oath (Pet. App. A-27 to A-28). Finding that the magistrate's testimony had not been "definite and clear," Judge Lumbard stated that he would hold the district court's factual determination to be "clearly erroneous." Although we argued in the district court that the agent and the local officer assisting him were testifying truthfully, we did not attack the district court's findings on appeal.

If, on the other hand, he is convicted and his conviction is affirmed, he will be able to present the claim raised in this petition, as well as any others that may arise during the trial, by seeking review in this Court of the final judgment.

2. In any event, the court of appeals was correct in reinstating the indictment. As the court recognized, there are some decisions suggesting that dismissal of an indictment may be ordered where a defendant has been prejudiced by serious governmental misconduct or where only the extreme remedy of dismissal will be sufficient to deter widespread unlawful conduct and to maintain the integrity of the legal process. See, *e.g.*, *United States* v. *Fields*, 592 F.2d 638, 648-649 (2d Cir. 1978), petitions for cert. pending, Nos. 78-1474, 78-1480, 78-1483; *United States* v. *McCord*, 509 F.2d 334, 349-350 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 390 (1975). But, as the court of appeals correctly held, the rationale of those decisions provides no justification for the dismissal here.

Both courts below recognized that petitioner was not prejudiced either by the misstatements in the affidavit for the arrest warrant or by the agents' alleged perjury at the pre-trial hearing. The district court made it clear that its order of dismissal here was not aimed at redressing any injury suffered by petitioner or his co-defendant, but rather at imposing the most extreme sanction possible on the government (see Pet. App. A-13 to A-14). Indeed, as the court of appeals pointed out, petitioner was certainly

not prejudiced, and the government's conduct may have given him an advantage at trial (Pet. App. A-26):

> [Petitioner] suffered no prejudice by the misconduct that was found to have occurred. There is no claim that the grand jury that indicted [petitioner] was misled in any way. As stated in Part II, there was ample probable cause for the arrest. No evidence was gathered that would not have been obtained absent the misconduct. If anything, the [petitioner] might even have been advantaged by the entire sequence of events. The misstatements in the affidavit weakened, rather than strengthened, the showing of probable cause to the Magistrate. Also [petitioner] now has substantial material with which to impeach important government witnesses if, in the face of such impeachment material, they testify at trial.

Where, as here, a defendant suffers no prejudice as a result of an isolated episode of government misconduct, he is not entitled to the dismissal of a properly framed indictment. See, *e.g.*, *United States* v. *Owen*, 580 F.2d 365, 367 (9th Cir. 1978); *United States* v. *Acosta*, 526 F.2d 670 (5th Cir.), cert. denied, 426 U.S. 920 (1976).

The court of appeals also correctly concluded (Pet. App. A-26) that the extreme remedy of dismissal was not justified by the necessity of deterring widespread misconduct or of maintaining judicial integrity, since the district court made "no finding of widespread or continuous official misconduct of the

dimensions necessary to warrant imposition of the sanction of dismissal." There is no support in the record for petitioner's bald assertion that the remedy of dismissal is required because no official sanctions are ever imposed upon agents of the federal government. Cf. *United States* v. *Caceres*, No. 76-1309 (Apr. 2, 1979), slip op. 14 & n.25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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